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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LINDAUER, Defendant and Appellant.	A158813 (Del Norte County Super. Ct. No. CRF189617)

Defendant Michael Lindauer pleaded guilty to arson and unlawfully taking a vehicle, and the trial court sentenced him to six years in prison and imposed various fines and fees.

On appeal, defendant contends (1) the trial court violated his state and constitutional rights by imposing fines and fees without first determining his ability to pay under *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164 (*Dueñas*), and (2) he is entitled to seven additional days of presentence custody credit.

The Attorney General responds that the *Dueñas* claim is forfeited and that defendant's presentence custody credits must be *reduced* by 157 days because the trial court awarded defendant conduct credit for time spent in a state hospital in contravention of established case law. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 30, fn. 6 ["Section 4019 provides that its formula for good behavior credit applies to persons detained, prior to felony

sentencing, in specifically enumerated *local facilities*, including '*county* jail[s], industrial farm[s], or road camp[s].' . . . The statute does not apply to presentence time spent receiving treatment 'in [such] nonpenal institutions . . . as state hospitals' "].)

We asked for supplemental briefing on whether defendant's appeal must be dismissed under Penal Code[1] sections 1237.1 and 1237.2. Defendant responds that he does not oppose dismissal of the appeal. The Attorney General argues this court should not dismiss the appeal and should grant its request for correction of the sentence.

We conclude defendant's appeal is barred under sections 1237.1 and 1237.2 and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2018, the Del Norte County District Attorney filed a criminal complaint charging defendant with 12 counts of arson of a forest (§ 451, subd. (c); counts 1 through 12) and one count of unlawfully driving or taking a motor vehicle with a prior conviction for the same offense (Veh. Code, §§ 10851; 666.5; count 13).

In December 2018, the trial court found defendant not competent to stand trial. In January 2019, defendant was committed to the trial competency program at the Department of State Hospitals.

In September 2019, the medical director of Atascadero State Hospital certified that defendant was competent to stand trial. The same month, the trial court found defendant competent to stand trial and reinstated the criminal proceedings.

In October 2019, the parties reached an agreement under which defendant pleaded guilty to unlawfully driving or taking a vehicle and one

[1] Further undesignated statutory references are to the Penal Code.

count of arson in exchange for the terms of the two offenses to be served concurrently and the dismissal of the remaining charges. The trial court sentenced defendant to six years in prison with 685 days of presentence custody credit.

The court imposed various fines and fees totaling $1,670.

DISCUSSION

Section 1237.1 provides: "*No appeal shall be taken* by the defendant from a judgment of conviction *on the ground of an error in the calculation of presentence custody credits, unless* the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, *the defendant first makes a motion for correction of the record in the trial court*, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant's request for correction." (Italics added.)

Here, defendant seeks additional custody credit on appeal, but nothing in the clerk's transcript indicates he made a motion to correct the custody credit calculation. If this were defendant's only appellate claim, his appeal would be subject to dismissal under section 1237.1. (See *People v. Acosta* (1996) 48 Cal.App.4th 411, 425–426 [section 1237.1 "require[s] dismissal of an appeal where the only issue posited by the defendant involves an issue of presentence credits and the question was not preserved in the trial court"].)

However, section 1237.1 does not apply when an appellant raises additional appellate issues. "[W]hen other issues are litigated on appeal, . . . section 1237.1 'does not require defense counsel to file [a] motion to correct a presentence award of credits in order to raise that question on appeal.' " (*People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12.)

The question, then, is whether defendant has raised another cognizable issue to be litigated in this appeal. If not, section 1237.1 bars his appellate claim for additional custody credit.

Defendant's only other appellate claim is his *Dueñas* claim seeking remand for an ability-to-pay hearing regarding the fees and fines imposed, but this claim faces a similar statutory bar.

Section 1237.2 provides: "*An appeal may not be taken* by the defendant from a judgment of conviction *on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless* the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, *the defendant first makes a motion for correction in the trial court, which may be made informally in writing*. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction. *This section only applies* in cases *where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal*." (Italics added.)

Nothing in the clerk's transcript indicates defendant filed a motion challenging the "imposition" of fees and fines absent a hearing on ability to pay. Section 1237.2 has been held to apply when the appellant's only claim is a *Dueñas* claim seeking remand for a hearing on ability to pay. (See *People v. Hall* (2019) 39 Cal.App.5th 502, 503–504 [dismissing appeal where only issue "is not cognizable under section 1237.2" and rejecting appellant's contention that "section 1237.2 does not apply [to her *Dueñas* claim] because she is claiming a violation of her constitutional rights, not a miscalculation of the fees"].) Thus, defendant's *Dueñas* claim is subject to dismissal under section

1237.2 unless he raises another cognizable appellate issue on appeal, but, as we have seen, his only other claim is also subject to dismissal.

In short, defendant has raised two appellate claims each of which would be dismissed if brought alone. We see no reason why their combination should have the effect of saving both claims and, therefore, conclude defendant's appeal is subject to dismissal under sections 1237.1 and 1237.2. In supplemental briefing, defendant does not oppose dismissal of his appeal based on these statutes.

The Attorney General does not agree to dismissal and argues this court should grant its request for correction of the sentence. We decline to do so. When a defendant raises cognizable issues on appeal, the Attorney General may raise a sentencing error despite not having appealed or raised the issue in the trial court because the "error appears to be in the nature of an unauthorized sentence, [which] . . . may be corrected whenever it is brought to the attention of a court." (*People v. Francisco* (1994) 22 Cal.App.4th 1180, 1193 [reducing presentence credit by one day where trial court miscalculated conduct credit].) But there is an important caveat: an appellate court "is empowered to correct these errors [that is, miscalculation of custody credit] whenever either side requests such relief, *so long as it is not the only issue* on appeal." (*People v. Duran* (1998) 67 Cal.App.4th 267, 270 (*Duran*), italics added.) In this case, the Attorney General's request is, in effect, the only issue on appeal.

In *Duran*, the defendant appealed, and the reviewing court concluded his claims lacked merit. (67 Cal.App.4th at p. 269.) The Attorney General in *Duran* pointed out that the trial court incorrectly calculated the defendant's conduct credit, arguing that the award of 332 days of presentence conduct credit should be reduced to 76 days. (*Ibid.*) The *Duran* court observed: "By

presenting this argument on appeal, the Attorney General implicitly recognizes that this court is authorized to entertain it and to grant the relief requested. In other cases, the Attorney General has argued that, pursuant to . . . section 1237.1, the appellate court lacks authority to correct errors in calculating the amount of presentence conduct credits to which a defendant is entitled. That statute applies to appeals by a defendant. The constitutional problem that would be presented if the statute were to be construed to allow such corrections when sought by the People, but to refuse it when sought by the defendant, is manifest. At argument, the Attorney General recognized that fact and conceded that this court is empowered to correct these errors whenever either side requests such relief, so long as it is not the only issue on appeal." (*Duran, supra,* 67 Cal.App.4th at pp. 269–270.)

Duran suggests it would violate the constitution to allow the Attorney General to raise a sentencing error on appeal when (1) it is the only issue on appeal, and (2) the People failed to make a motion for correction of the alleged calculation error in the trial court and failed to file an appeal, given that section 1237.1 would bar a defendant from raising such a claim in similar circumstances. We cited *Duran* in our order requesting supplemental briefing from the parties, but the Attorney General has not addressed the case in its supplemental letter brief.

Instead, the Attorney General cites *People v. Delgado* (2012) 210 Cal.App.4th 761, to support his argument that considering his claim now would serve the purpose of judicial economy. In *Delgado*, the Court of Appeal held that "section 1237.1 does not preclude a defendant from raising, as the sole issue on an appeal, a claim his or her presentence custody credits were calculated pursuant to the wrong version of the applicable statute." (*Id.* at p. 763.) The *Delgado* court reached this conclusion based on its interpretation

of the statute to apply only to claims of "alleged mathematical or clerical error." (*Id*. at p. 765.) The difference between *Delgado* and the current case is the defendant in *Delgado* (that is, the proponent of the claim that the trial court applied the wrong version of the applicable statute) filed an appeal. In the present case, the People did not file an appeal raising the claim that the trial court failed to apply the appropriate case law on calculating custody credits for time spent in state hospitals. The Attorney General cites no authority demonstrating this court should entertain an appellate claim—raised for the first time in his respondent's brief—when the defendant's appeal is subject to dismissal and the People did not file an appeal.

DISPOSITION

The appeal is dismissed.

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Miller, J.

WE CONCUR:

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Richman, Acting P.J.

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Stewart, J.

A158813, *People v. Lindauer*